A

Kobchai Sosothikul (representative of the estate of Boonsom Boonyanit @ Sun Yok Eng, deceased) v Pengarah Tanah dan Galian, Pulau Pinang

B

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–137 OF 2005
VAZEER ALAM MYDIN JC
10 JANUARY 2011

C

Evidence — Burden of proof — Fraud — Forgery — Whether plaintiff had produced sufficient evidence to discharge his burden that there was fraud and forgery involved in impugned MOT — Adverse inference — Whether defendant's failure to call attesting officer as witness would lead to adverse inference being drawn against it — Whether officer was best witness to shed light on question of forgery — Evidence Act 1950 s 114(g)

D

Land Law — Indefeasibility of title and interests — Forged transfer — Defendant issued replacement advanced certificates of title ('ACT') to impostor — Sale of lands to bona fide purchaser for value — Whether provisions of National Land Code ('NLC') would apply to lands — Whether plaintiff had adduced evidence to show that defendant had failed to comply with mandatory statutory requirements provided in NLC for the issuance of ACT

E

F

Tort — Negligence — Duty of care — Defendant issued replacement advanced certificates of title to impostor — Whether defendant and its officers owed duty of care to deceased landowner and her estate — Whether there had been breaches of that duty — Whether defendant's failure to follow mandatory statutory procedures provided in National Land Code constituted breach — Whether damages suffered by deceased and her estate had flowed from defendant's breaches — Whether damages proven — Limitation — Whether cause of action in tort arose when claimant first suffered damages — Whether plaintiff's action filed more than 36 months after deceased became aware of fraudulent transfer — Whether damages were suffered only when there was finality in plaintiff's suit against bona fide purchaser for value — Public Authorities Protection Act 1948 s 2(a)

G

H

I

The plaintiff was the representative of the estate of his late mother Mrs Bonsoom Boonyanit @ Sun Yok Eng ('the deceased'), who was residing in Thailand. The deceased was the registered proprietor of two pieces of land situated in Bandar Tanjung Bunga, in Pulau Pinang ('the lands'). The plaintiff claimed that the defendant or his officers had acted negligently and in breach of their statutory duties when they issued two replacement advanced certificates

of title ('ACT') to a person unknown purporting to be the deceased ('the impostor'). The defendant alleged that it had issued the replacement ACT to the impostor in reliance of a Statutory Declaration ('the SD') purportedly affirmed by the deceased that she had lost the original memorandum of transfer. However, in fact the deceased had never lost the original memorandum of transfer ('the MOT'), which was always in her possession, had not entered into Malaysia during the period in question or signed the SD that she had lost the original MOT. Subsequently, the lands were transferred to Adorna Properties Sdn Bhd ('Adorna') by way of the ACT of the land issued by the defendant and a memorandum of transfer signed by the impostor ('the impugned MOT'). The fraud and forgery only came to light when the deceased's eldest son saw an advertisement in a Thai newspaper requesting any person having a claim to the lands to contact a law firm, which had been acting for the impostor in the transfer of the lands to Adorna. The plaintiff had taken all necessary steps and exhausted all legal avenues to recover the land from Adorna but failed. The plaintiff has now filed the instant action in negligence and breach of statutory duty against the defendant. By way of this action the plaintiff claimed total damages of RM14,636,854.48, which included the market value of the lands, total legal fees and disbursements incurred by the deceased and her estate and total amount of assessments and quit rent paid on the lands, interest and cost. It was the plaintiff's case that the defendant had acted without the mandate of the deceased, the rightful owner of the land, and as such the ACT issued by the defendant was void and could not be registered as valid documents of title. The plaintiff averred that the assistant district land administrator ('the attesting officer'), who attested the signature in the impugned MOT, had failed or neglected to exercise sufficient care and adopt the proper measures to ensure that the identity of the person present was correct and failed to appreciate that the impugned MOT was a forged instrument. Thus, the plaintiff contended that the defendant through its officers was negligent and breached its statutory duties in accordance with the law, when it registered the transfer of the land in favour of Adorna. The defendant denied negligence or breach of statutory duty in the issuance of the ACT as well as in the registration of the transfer of the land from the deceased to Adorna. In the alternative the defendant stated that the plaintiff's claim, which was filed on 15 March 2005, was time barred by virtue of s 2(a) of the Public Authorities Protection Act 1948 ('PAPA'), in that it was filed more than 36 months after the deceased became aware of the fraudulent transfer.

Held, dismissing the claim with costs:

(1) From the evidence adduced it was clear that the provisions of the National Land Code ('NLC'), and in particular ss 166(1)(d),168 and 433 of the NLC, would apply to the transfer of the lands. It was also clear from the evidence adduced that the defendant had failed to comply with

all of the mandatory statutory requirements provided in the NLC for the issuance of the ACT (see paras 24, 25 & 27).

(2) The finding of fact by the Court of Appeal in *Boonsoom Boonyanit v Adorna Properties Sdn Bhd* that there was forgery involved in the impugned MOT would stand. As such the plaintiff had produced sufficient evidence to discharge his burden with regard to the attestation and registration of the transfer of the lands. Further the attesting officer had not been called as a witness by the defendant even though he would be the best witness to shed light on the question of forgery and the circumstances leading to it. In this regard the court found that it ought to draw an adverse inference against the defendant under s 114(g) of the Evidence Act 1950 for not calling this witness (see paras 28–29).

(3) This court found that a substantial part of the plaintiff's evidence had remained unchallenged and uncontroverted, in that the facts relied upon by the defendant in its defence were not put to the plaintiff's only witness (see para 30).

(4) Applying the law to the facts of this case it was found that the plaintiff had successfully proved all the essentials of his claim. The defendant state director and his officers owed a duty of care to the deceased, the land owner, and her estate to act in commensurate with the standard of care that was required of them in ensuring that mandatory statutory procedures were followed. The facts of the case revealed that there had been breaches of that duty in the issuance of the ACT as well as the registration of the lands through the impugned MOT. The fraud could have been prevented had the defendant followed the mandatory statutory procedure provided in the NLC. The plaintiff had also shown that the damages suffered by the deceased and her estate had flowed from the defendant's breaches (see paras 33–34 & 37).

(5) A cause of action in tort arose when the claimant first suffered damages. If this court accepted the plaintiff's argument that in the facts of this case damages were suffered only when there was finality in the plaintiff's suit against Adorna, then that finality would come about when the Federal Court allowed Adorna's appeal on 22 December 2000 and limitation would have set in 36 months later, ie on 22 December 2003. This would mean that the filing of the present action on 15 March 2005 would be out of time. The law of limitation as it stood was very strict and rigid and this court did not have the power to enlarge or abridge time. Further, the plaintiff's argument that limitation set in after the second of the two reviews was dismissed by the Federal Court was wholly untenable in law or in fact. If accepted it would lead to endless applications for review by litigants that would keep limitation going without end. As such, the plaintiff's application was time barred by s 2(a) of the PAPA (see paras 46–47, 55 & 57).

[Bahasa Malaysia summary

Plaintif adalah wakil kepada harta pusaka mendiang ibunya Puan Bonsoom Boonyanit @ Sun Yok Eng ('si mati'), yang menetap di Thailand. Si mati adalah pemilik berdaftar dua bidang tanah yang terletak di Bandar Tanjung Bunga, di Pulau Pinang ('tanah tersebut'). Plaintif menyatakan bahawa defendan dan pegawai-pegawainya telah bertindak dengan cuai dan dalam pelanggaran kewajipan statutori mereka apabila mereka mengeluarkan dua sijil hak milik pendahuluan ('SHP') kepada seseorang yang tidak dikenali yang menyamar sebagai si mati ('penyamar'). Defendan menyatakan bahawa ia telah mengeluarkan SHP ganti kepada penyamar tersebut dengan bergantung kepada satu akuan statutori ('AS') kononnya diikrarkan oleh si mati bahawa dia telah kehilangan memorandum pindah milik asal. Walau bagaimanapun, fakta adalah bahawa si mati tidak pernah kehilangan memorandum pindah milik yang asal ('MPM'), yang sentiasa dalam milikannya, tidak memasuki Malaysia semasa tempoh yang dipersoalkan atau menandatangani AS bahawa dia kehilangan MPM asal. Kemudian tanah tersebut dipindahkan kepada Adorna Properties Sdn Bhd ('Adorna') melalui SHP tanah tersebut yang dikeluarkan oleh defendan dan memorandum pindah milik ditandatangani oleh penyamar tersebut ('MPM yang dipersoalkan'). Fraud dan penipuan hanya diketahui apabila anak sulung si mati terlihat satu iklan di dalam akhbar Thai meminta sesiapa yang mempunyai tuntutan terhadap tanah tersebut menghubungi sebuah firma guaman, yang bertindak bagi penyamar tersebut dalam pemindahan milik tanah tersebut kepada Adorna. Plaintif telah mengambil kesemua langkah-langakah yang perlu dan menggunakan kesemua pendekatan undang-undang untuk mendapatkan semula tanah tersebut daripada Adorna tetapi gagal. Plaintif kini memfailkan tindakan ini bagi kecuaian dan pelanggaran kewajipan statutori terhadap defendan. Melalui tindakan ini, plaintif menuntut sejumlah ganti rugi sebanyak RM14,636,854.48 yang termasuk nilai tanah tersebut, jumlah keseluruhan fi guaman dan perbelanjaan yang ditanggung oleh si mati dan harta pusakanya dan jumlah keseluruhan taksiran dan cukai tanah yang dibayar bagi tanah tersebut, faedah dan kos. Adalah kes plaintif bahawa defendan telah bertindak tanpa mandat si mati, pemilik yang mempunyai hak sebenar kepada tanah tersebut, dan oleh demikian SHP yang dikeluarkan oleh defendan adalah batal dan tidak boleh didaftarkan sebagai dokumen hak milik yang sah. Plaintif menyatakan bahawa penolong pentadbir tanah daerah ('pegawai yang menjadi saksi'), yang menyaksikan penandatanganan MPM yang dipersoalkan, telah gagal atau cuai dalam melaksanakan kewajipan berhati-hati yang secukupnya dan menggunakan cara yang betul untuk memastikan identiti orang yang hadir adalah betul dan gagal mempertimbangkan bahawa MPM yang dipersoalkan adalah instrumen yang dipalsukan. Oleh itu, plaintif menghujah bahawa defendan melalui pegawai-pegawainya adalah cuai dan melanggar kewajipan statutori menurut undang-undang, apabila ia mendaftarkan pindah milik tanah tersebut memihak kepada Adorna. Defendan menafikan kecuaian atau

pelanggaran kewajipan statutori dalam pengeluaran SHP dan juga dalam pendaftaran pindah milik tanah tersebut daripada si mati kepada Adorna. Secara alternatif defendan menyatakan bahawa tuntutan plaintif, yang difailkan pada 15 Mac 2005, adalah dihadkan oleh masa berikutan s 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 ('APPBA'), di mana ia difailkan lebih daripada 36 bulan selepas si mati mengetahui tentang pemindahan milik secara fraud.

Diputuskan, menolak tuntutan dengan kos:

(1) Daripada keterangan yang dikemukakan adalah jelas bahawa peruntukan Kanun Tanah Negara ('KTN'), khususnya ss 166(1)(d), 168 dan 433 KTN, akan beraplikasi kepada pindah milik tanah tersebut. Adalah juga jelas daripada keterangan yang dikemukakan bahawa defendan telah gagal mematuhi kesemua keperluan statutori yang mandatori yang diperuntukkan dalam KTN untuk pengeluaran SHP (lihat perenggan 24–25 & 27).

(2) Penemuan fakta oleh Mahkamah Rayuan di dalam *Bonsoom Boonyanit v Adorna Properties Sdn Bhd* bahawa terdapat penipuan di dalam MPM yang dipersoalkan dikekalkan. Oleh demikian plaintif telah mengemukakan keterangan yang mencukupi dalam melepaskan bebannya berkaitan dengan penyaksian dan pendaftaran pindah milik tanah. Selanjutnya, pegawai yang menjadi saksi tidak dipanggil sebagai saksi oleh defendan walaupun dia akan menjadi saksi yang paling baik untuk menjelaskan persoalan penipuan dan keadaan yang menjurus kepadanya. Dalam keadaan ini, mahkamah mendapati bahawa ia wajar membuat inferens bertentangan terhadap defendan di bawah s 114(g) Akta Keterangan 1950 kerana tidak memanggil saksi ini (lihat perenggan 28–29).

(3) Mahkamah ini mendapati bahawa sebahagian besar keterangan plaintif kekal tidak dicabar dan tidak disangkal, di mana fakta yang disandar oleh defendan dalam pembelaannya tidak dikemukakan kepada satu-satunya saksi plaintif (lihat perenggan 30).

(4) Mengaplikasi undang-undang kepada fakta di dalam kes ini adalah didapati bahawa plaintif telah berjaya membuktikan perkara penting dalam tuntutannya. Pengarah negeri defendan dan pegawai-pegawainya mempunyai kewajipan berjaga-jaga yang diperlukan terhadap mereka dalam memastikan bahawa prosedur statutori mandatori diikuti. Fakta kes ini mendedahkan bahawa terdapat pelanggaran kewajipan tersebut dalam pemberian SHP dan juga pendaftaran tanah tersebut melalui MPM yang dipersoalkan. Fraud hanya boleh dihalang jika defendan mematuhi prosedur statutori mandatori yang diperuntukkan di dalam

KTN. Plaintif juga telah menunjukkan bahawa kerugian yang dialami oleh si mati dan estetnya disebabkan oleh pelanggaran defendan (lihat perenggan 33–34 & 37).

(5) Satu kausa tindakan timbul di dalam tort apabila penuntut mula-mula mengalami kerugian. Jika mahkamah ini menerima hujahan plaintif bahawa di dalam fakta kes ini kerugian dialami hanya apabila terdapat kemuktamadan di dalam guaman plaintif terhadap Adorna, maka kemuktamadan tersebut hanya akan wujud apabila Mahkamah Persekutuan membenarkan rayuan Adorna pada 22 Disember 2000 dan had masa akan bermula 36 bulan kemudian iaitu 22 Disember 2003. Ini akan bermaksud bahawa pemfailan tindakan semasa pada 15 Mac 2005 akan dihadkan oleh masa. Undang-undang had masa yang wujud adalah amat tegas dan tegar dan mahkamah ini tidak ada kuasa untuk melanjutkan atau menambah masa. Selanjutnya, hujahan plaintif bahawa had masa bermula selepas semakan kedua ditolak oleh Mahkamah Persekutuan adalah boleh dipertahankan dari segi undang-undang dan fakta. Jika diterima ia akan menjurus kepada permohonan yang tidak berhujung untuk semakan oleh litigan-litigan yang akan menjadikan had masa tidak berhujung. Oleh demikian permohonan plaintif adalah dihadkan masa oleh s 2(a) APPBA (lihat perenggan 46–47, 55 & 57).]

Notes

For a case on forged transfer, see 8(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 3332.

For cases on duty of care, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1157–1226.

For cases on fraud, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 568–588.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241; [2001] 2 CLJ 133, FC (refd)

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (folld)

AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors [2010] 3 MLJ 784, CA (refd)

Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 2 MLJ 137; [2008] 6 CLJ 1, FC (refd)

Asia Pacific Land Bhd & Ors v Datuk Bandar Kuala Lumpur [2006] 2 MLJ 137, HC (folld)

Badan Peguam Negara v Kerajaan Malaysia [2009] 2 MLJ 161, FC (refd)

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1995] 2 MLJ 863; [1995] 4 CLJ 45, HC (refd)

Boonsoom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62; [1997] 3 CLJ 17, CA (refd)
Browne v Dunn (1893) 6 R 67, HL (folld)
Cartledge & Ors v E Jopling & Sons Ltd [1963] 1 All ER 341, HL (refd)
Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409, SC (refd)
Dato' Seri Anwar bin Ibrahim v Public Prosecutor [2011] 1 MLJ 158, FC (refd)
Hu Sepang v Keong On Eng & Ors [1991] 1 MLJ 440, HC (folld)
Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2) [1997] 1 WLR 1627, HL (refd)
Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor [2007] 7 MLJ 1, FC (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (folld)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1, FC (refd)
Teoh Guat Looi v Ng Hong Guan [1994] MLJU 365, HC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
National Land Code ss 12, 22, 166(1)(d), 168, 433, Form 10D
Public Authorities Protection Act 1948 s 2(a)
Rules of the Federal Court 1995 r 137

Bastion Vendargon (Stephen Chuan with him) (Lim Kian Siew & Co) for the plaintiff.
Mohd Ghazali (Senior Federal Counsel, State Legal Advisor Office) for the defendant.

Vazeer Alam Mydin JC:

[1] This is the sequel to the Boonsom Boonyanit-Adorna properties tragic trilogy. The facts giving rise to the present cause of action have been well set out in the judgments of the High Court, Court of Appeal and Federal Court in the suit brought by Boonsom Boonyanit against Adorna Properties (see *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1995] 2 MLJ 863; [1995] 4 CLJ 45 (HC); *Boonsoom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62; [1997] 3 CLJ 17 (CA); and *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241; [2001] 2 CLJ 133 (FC)).

THE PLAINTIFF'S AND THE DEFENDANT'S CASE

[2] The plaintiff is the representative of the estate of his late mother Mrs Boonsom Boonyanit @ Sun Yok Eng ('Mrs Boonsom'). Mrs Boonsom was the registered proprietor of all those pieces of land known as Holding Nos 3606 and 3607, both situate at Bandar Tanjung Bunga, Daerah Timur Laut, Pulau Pinang (now known as Lot Nos 3606 and 3607 both situate at Bandar Tanjung

Bunga, Daerah Timur Laut comprised in Grant (First Grade) Registration Nos 28476 and 30255 respectively) ('the said land'). The said land was first acquired by Mrs Boonsom vide memorandum of transfer dated 29 December 1966 ('the original memorandum of transfer') which was registered on 18 January 1967 vide Presentation No 180 Folio 178 Vol 9. The parties have agreed that both titles to the said land was made indefeasible by the defendant on 20 December 1985 and 1 January 1986 respectively based on the workings of s 88 of the National Land Code (Penang and Malacca Titles) Act 1963, as applicable then.

[3] The said land was transferred to Adorna Properties Sdn Bhd ('Adorna') sometime on or about 24 May 1989. It is agreed by the parties in the statement of agreed facts that the transfer of the said land to Adorna was procured via:

(a) two advance certificates of title ('Perakuan-Perakuan Pendahuluan Mengenai Hakmilik') of the land ('the ACT') issued by the defendant;

(b) a memorandum of transfer dated 7 April 1989 purportedly signed by Mrs Boonsom ('the impunged MOT'); and

(c) a statutory declaration purportedly affirmed by Mrs Boonsom on 6 April 1989 explaining the discrepancies of names in the ACT and her passport ('the 6.4.1989 SD').

[4] The plaintiff claims that Mrs Boonsom and her family have at all material times had in their custody the original memorandum of transfer as evidence of a conveyance or title deed for the land in accordance with the provisions of the National Land Code (Penang and Malacca Titles) Act 1963 and had never parted possession of the said original memorandum of transfer until 1994 for the purposes of court proceedings.

[5] The plaintiff avers that in reliance of an earlier statutory declaration purportedly affirmed by Mrs Boonsom on 18 June 1988 ('the 18.6.1988 SD') alleging that she had lost the original memorandum of transfer, the defendant had issued and released to person or persons unknown the ACT in respect of the land. It is the plaintiff's case that at all material times, Mrs Boonsom did not affirm the 18 June 1988 SD nor has she ever lost the original memorandum of transfer.

[6] The plaintiff further avers that the defendant or his officers acted without the mandate of Mrs Boonsom as the rightful owner of the land and were negligent and/or failed and/or omitted to take reasonable precaution in the exercise of their statutory duties in accordance with the provisions of the law in issuing and releasing the ACT to person or persons unknown. The plaintiff has particularised the breaches as follows:

(a) the defendant or his officer failed and/or omitted to appreciate that the

signature of Mrs Boonsom in the original memorandum of title differs from the signature in the 18 June 1988 SD;

(b) the defendant or his officer failed and/or omitted to appreciate that Mrs Boonsom's address for service in Penang as appears in the quit rent records is different from the address stated in the 18 June 1988 SD;

(c) the defendant or his officer failed and/or omitted to cause notices to be published in the gazette in respect of the alleged loss of the original memorandum of transfer and to further ensure that the provisional register document of titles were open for inspection prior to the issuance of the ACT;

(d) the defendant or his officer failed and/or omitted to deliver or cause to be delivered copies of the aforementioned notices to Mrs Boonsom at her address for service in Penang as appears in the defendant's quit rent records prior to the issuance and release of the ACT;

(e) the defendant or his officer failed and/or omitted to cause the said notices to be published in the manner by affixing the same in a conspicuous position on the land and at other places as required under law prior to the issuance and release of the ACT;

(f) prior to the issuance and release of the ACT, the defendant or his officer failed and/or omitted to cause the said notices to be published in such newspapers circulating in Penang as well as in Thailand where Mrs Boonsom was residing; and

(g) the defendant or his officer failed and/or omitted to serve on Mrs Boonsom at her address for service in Penang as appears in the defendant's quit rent records a notice requiring her, the true registered proprietor at that material time, to attend for the purpose of taking delivery of the ACT.

[7] The plaintiff states that as a result of the failure and/or omission of the defendant or his officer in discharging their duty in accordance with laws and in view of the fact that Mrs Boonsom had never parted with the original memorandum of transfer, the ACT issued is void and cannot be regarded as a valid document of title.

[8] The signature appearing on the impugned MOT purporting to be that of Mrs Boonsom was attested by one Arifin bin Awang, the then Assistant District Land Administrator of Bukit Mertajam, an officer of the defendant. The plaintiff avers that Mrs Boonsom had never at any time executed the impugned MOT and that it is a forged instrument which cannot in law pass good title to the transferee named therein. Likewise, the plaintiff asserts that Mrs Boonsom did not affirm the 6 April 1989 SD.

[9] The plaintiff avers that the Assistant District Land Administrator of Bukit Mertajam was negligent in attesting the signature purporting to be that of Mrs Boonsom in the impugned MOT as he had failed and/or neglected to exercise sufficient care and adopt the proper measure to ensure that the identity of the person present is correct before testifying that the signature on the memorandum of transfer was the true signature of Mrs Boonsom.

[10] The plaintiff further avers that the defendant through his officers at the land office, was negligent and had breached his duty and acted without the mandate of Mrs Boonsom as the rightful owner of the said land in registering the transfer of the said land in favour of Adorna and had particularised the negligence as follows:

a. the defendant or his officer failed to appreciate that the impugned MOT is a forged instrument and that the purported signatures of Mrs Boonsom in the impugned MOT and the 6 April 1989 SD are different from the true signature of Mrs Boonsom as in the original memorandum of transfer;

b. the defendant or his officer was in breach of his duty in negligently registering the impugned MOT as the ACT (including the issue documents of title substituting the ACT subsequently) presented together with the impugned MOT for registration was a void and/or invalid document of title;

c. the defendant or his officer failed to appreciate that the addresses stated in the impugned MOT and the 6 April 1989 SD were different from Mrs Boonsom's address for service in Penang as appearing in the defendant's quit rent records; and

d. the defendant or his officer failed to appreciate that the person purporting to be Mrs Boonsom ('the imposter') who executed the impugned MOT, the 18 June 1988 SD and the 6 April 1989 SD had been using the imposter's Thai identity card and Thai passport interchangeably for identification purposes.

[11] The fraud and forgery began to unravel when Mrs Boonsom's eldest son saw an advertisement in a Thai newspaper dated 11 June 1989 requesting any person having a claim or an interest on the land to contact the law firm of Messrs Khor, Ong & Co. Mrs Boonsom's accountant in Penang contacted Messrs Khor, Ong & Co (who had acted for the imposter in the transfer of the said land to Adorna) but did not get much information from them. Thereafter, investigations were carried out in Penang through the law firm of Messrs Lim Kean Siew & Co. Searches carried out at the relevant land office registry revealed that the said land had been fraudulently transferred to Adorna using the impugned MOT.

[12] Mrs Boonsom thereafter filed legal proceedings against Adorna at the Penang High Court (Penang High Court Civil Suit No 22–401 of 1989) which was dismissed on 28 April 1995. Mrs Boonsom appealed to the Court of Appeal under Civil Appeal No P-02–268 of 1995. On 17 March 1997, the Court of Appeal allowed the appeal and reversed the decision of the High Court. Adorna then appealed to the Federal Court vide Civil Appeal No 02–14 of 1997(P) and on 22 December 2000 the Federal Court allowed Adorna's appeal essentially on the issue of indefeasibility of title — whether in the circumstance of the facts it was one of immediate or deferred indefeasibility. The Federal Court held it to be one of immediate indefeasibility. That decision came under much criticism as it was a departure from the law and was generally regarded as an erroneous decision.

[13] A few months prior to the Federal Court decision, Mrs Boonsom had on 23 May 2000 passed away and her son the plaintiff here as representative of the estate filed two separate motions to the Federal Court under r 137 of the Rules of the Federal Court 1995 for review of that decision. The first review was purely on corum failure, namely, that two of the Federal Court judges who heard the appeal together with the then Chief Justice had retired before the date of the decision. The second review was for more substantive challenges including an attempt to demonstrate that the decision was blatantly wrong. Both motions were dismissed by the Federal Court on 29 January 2002 and 27 August 2004 respectively.

[14] The plaintiff avers that Mrs Boonsom and the plaintiff as representative of the estate have taken all necessary steps and exhausted all legal avenues to recover the said land from Adorna. The plaintiff states that following the Federal Court's dismissal of the second motion on 27 August 2004, the estate of Mrs Boonsom could not recover the land. Thus, the filing of this action for negligence and breach of statutory duty against the defendant to recover damages suffered.

[15] The defendant denies negligence or breach of statutory duty in the issuance of the ACT as well as in the registration of the transfer of the said land from Mrs Boonsom to Adorna.

[16] The defendant states that he has no knowledge that Mrs Boonsom or her family at all material times had in their possession the original memorandum of transfer evidencing the transfer of the said land to Mrs Boonsom and the ownership of thereof by Mrs Boonsom, pursuant to the provisions of the National Land Code (Penang and Malacca Titles) Act 1963. The defendant asserts that the issuance of the ACT was in accordance to the governing laws and procedure relating to the same and denies that it was done

negligently or in breach of statutory duty. The defendant further denies all the particulars of negligence as alleged by the plaintiff.

[17] In the alternative, the defendant states that the plaintiff's claim is time barred by virtue of s 2(a) of the Public Authorities Protection Act 1948.

[18] The parties had agreed that the following were the issues to be tried:

(a) whether the defendant or his officer has acted without the mandate of Mrs Boonsom as the rightful owner of the said land and was negligent and/or failed and/or omitted to take reasonable precaution in the exercise of their statutory duties in accordance with the provisions of the law in issuing and releasing the ACT to person or persons unknown;

(b) whether the defendant or his officer has acted without the mandate of Mrs Boonsom as the rightful owner of the said land and was negligent and/or failed and/or omitted to take reasonable precaution in the exercise of their statutory duties in accordance with the provisions of the law in issuing and releasing the ACT to person or persons unknown;

(c) whether the defendant or his officer was negligent and/or failed and/or omitted to take reasonable and sufficient care in attesting the transferor's (imposter's) signature as that of Mrs Boonsom on the impugned MOT in favour of Adorna;

(d) whether the damage suffered and the loss of ownership and benefit of the said land by Mrs Boonsom and the estate subsequently was caused and/or attributed solely to the defendant and/or his employees, servants and/or agents' negligence and/or breach of statutory duties;

(e) whether the plaintiff's claim is barred by s 2(a) of the Public Authorities Protection Act 1948; and

(f) whether the plaintiff is entitled to claim against the defendant special damages of RM14,636,854.48 together with general damages, interest at 8%pa on the special and general damages and cost.

THE EVIDENCE

[19] The plaintiff gave evidence through his attorney and son, Prithep Sosothikul ('SP1'). The defendant on the other hand gave evidence through Hjh Saodah bt Nawawi, Timbalan Pengarah Pejabat Tanah dan Galian Pulau Pinang ('SD1').

[20] The evidence for the plaintiff on the material issues as adduced by its sole witness (SP1) was clear and was generally not challenged in

cross-examination. The plaintiff has successfully proven the following:

(a) that Mrs Boonsom had always kept the original memorandum of transfer in her possession until she handed over the same to her solicitors sometime in 1994 for the purposes of court proceedings;

(b) that Mrs Boonsom had not entered Malaysia from Thailand or anywhere else as evidenced by her passports for the material times;

(c) that Mrs Boonsom had not signed the 6 April 1989 SD nor the impugned MOT nor the sale and purchase agreement of that date and that the attestation and certification by one Arifin bin Awang, the then penolong pentadbir tanah in respect of the impugned MOT was clearly wrongful and negligent on the part of the employee, servant or agent of the defendant;

(d) the transfer of the said land to Adorna was effected by a forger through the fraud and forgery of persons unknown;

(e) that Mrs Boonsom had brought action to recover the said land from Adorna on the basis that Adorna's title could be defeated as they were immediate purchasers and that her action was dismissed by the High Court in 1995 and the decision of which was subsequently reversed by the Court of Appeal in 1997 where it was ordered that Adorna re-transfer the said land to her. However, this was short lived as Adorna's appeal to the Federal Court was allowed in 2000 and the decision of the Court of Appeal was reversed;

(f) the estate of Mrs Boonsom filed two motions to review the Federal Court decision, but they were dismissed on 29 January 2002 and 27 August 2004;

(g) the market value of the said land was about RM13,220,000 and the total amount of legal fees and disbursements spent by Mrs Boonsom and her estate was RM727,678.18 and Mrs Boonsom had also paid agreed cost of RM150,000 to Messrs Ghazi & Lim representing Adorna. Mrs Boonsom and her estate had also paid a total of RM89,176.30 as assessment and quit rent from 1990–2004. Therefore, the plaintiff has proved total damages amounting to RM14,186,854.48;

(h) Mrs Boonsom had the address of her accountant in Penang as her address for service of notices and correspondence; and that they had never received any notices regarding the issuance of new titles as replacement for the old;

(i) that there had been no notices or advertisements in newspapers circulating in Penang and/or Thailand nor any Government Gazette relating to the purported loss of the original titles of the said land dated

18 January 1967 nor that the provisional register documents of titles were open for inspection prior to the issuance of the replacement ACT; and

(j) that the negligent acts of issuing replacement ATC's without compliance to the National Land Code, and the act of attesting the imposter's signature in the impugned MOT has caused damages to the plaintiff.

[21] The defendant's sole witness Hjh Saodah bt Nawawi (SD1) in examination-in-chief had given evidence to the effect that:

(a) that the signature on the impugned MOT was witnessed by the said Arifin bin Awang, the then Penolong Pentadbir Tanah Daerah Seberang Perai Tengah, Bukit Mertajam, Penang;

(b) that the registrar was not aware that the 18 June 1988 SD was not affirmed by Mrs Boonsom;

(c) that the impugned MOT and accompanying documents for the transactions of sale and registration of transfer appeared to be in order; and

(d) that there was no necessity to comply with the need to gazette the loss of ACT, which she claimed was not the procedure at the material time.

[22] However, in cross-examination, in relation to the procedure to be adopted for the issuance of replacement titles at the material time, SD1 admitted that the provisions of the National Land Code were already in force in Penang in 1989 in respect of the said land. She also admitted that she had started work at the defendant's office — the Pejabat Pengarah Tanah dan Galian, Pulau Pinang — only in 2004 and that she has no personal knowledge of the transaction which took place in 1989. SD1's evidence was based entirely on the records of the defendant. SD1 also admitted that the said Arifin bin Awang was still working in her office and in fact at the time of trial was the Pengarah Tanah dan Galian, Pulau Pinang. However, Arifin bin Awang was not called as a witness for the defendant.

THE LAW

[23] The plaintiff's cause of action is twofold. The first is negligence and the second is breach of statutory duty. It is trite law that the plaintiff shoulders the burden of proof. Abdul Malik Ishak J (now JCA) had succinctly stated this principle of law in *Teoh Guat Looi v Ng Hong Guan* [1994] MLJU 365 in the following words:

> In civil cases, a party must prove his case before the burden shifts to the other side. In a criminal case, the prosecution's burden is a heavy one — to prove beyond reasonable doubt. In a civil case, it is on the balance of probabilities. That balance must be tilted by the plaintiff before the defendant makes his case.

[24] Now, has the plaintiff made out his case? The plaintiff's first complaint is that the defendant had negligently and in breach of statutory duty issued the replacement ACT to person or persons unknown. From the evidence adduced, and as admitted by the defendant's witness SD1 the provisions of the National Land Code ('NLC') applies to this transaction.

[25] Section 166(1)(d) of the NLC provides for the circumstance where title in continuation may be issued when the issue document of title has been lost. When the provisions under s 166(1)(d) are invoked, then s 168 of the NLC which prescribes the procedure to be adopted for the issuance of title in continuation would apply. This statutory procedure requires the registrar or land administrator to cause a notice of intention to issue title in continuation to be published in the gazette in Form 10D, and copies of the said notice is to be served on every person or body having a registered interest in the land, and be published in accordance with s 433 of the NLC.

[26] Section 433 of the NLC provides that:

> Any provision of this Act requiring a copy of a notice or notification affecting land to be published in accordance with the provisions of this section shall be construed as requiring a copy of the notice or notification to be —
>
> (a) affixed in a conspicuous position —
>
> (i) on the land and on the penghulu's office or balai in the area in which the land is situated; and
>
> (ii) in that area, on such court-houses and mosques (if any) and in such markets and other public places (if any) as the State Director thinks fit;
>
> (b) where the State Authority considers that publication in a newspaper is desirable, published in such newspapers circulating in the State as the State Director thinks fit.

[27] It is clear from the evidence adduced that the defendant had failed to comply with all of the above statutory requirements. Though, SD1 initially suggested that the old procedure as in the National Land Code (Penang and Malacca Titles) Act 1963 would apply, she had nevertheless in cross-examination admitted that the NLC was already in force in Penang at the material time in 1989. Further, the National Land Code (Penang and Malacca Titles) Act 1963 was an interim provision before the NLC took effect and did not specify nor provide for the issuance of continuation titles or substitution of lost titles; nor the procedure therefore. In any event, since the NLC was applicable to the said land in 1989, I find that s 166(1)(d), s 168 and s 433 of the NLC would apply and the defendant must follow the procedure prescribed therein.

[28] Now, coming to the next issue raised by the plaintiff, namely, the attestation of the impugned MOT and registration of the transfer, the plaintiff has produced sufficient evidence to discharge his burden. In fact, the Court of Appeal in its judgment as reported in *Boonsoom Boonyanit v Adorna Properties Sdn Bhd* expressly found that there was forgery involved in the impugned MOT. On appeal the Federal Court did not disturb this finding of fact but reversed the Court of Appeal's decision based on the question of immediate or deferred indefeasibility. Therefore, that finding by the Court of Appeal stands.

[29] The Court of Appeal in *Boonsoom Boonyanit v Adorna Properties Sdn Bhd* also dealt with the issue as to which party ought to have called Arifin bin Awang, the attesting officer as a witness (pp 38–39 of that judgment refers) and held that in the light of the denial of due execution by Mrs Boonsom, that onus of calling the attesting officer rested on Adorna in that case. Further, the Federal Court in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1 (which reversed its earlier decision in *Adorna Properties Sdn Bhd v Boonsom Boonyanit*) held that the onus to call the attesting officer as witness is on the party asserting due execution of a document. Here, that onus is borne by the defendant. However, the attesting officer Arifin bin Awang was not called, even though he would be the best witness to shed light on the question of forgery and the circumstance leading to it. Arifin bin Awang at the time of trial was in fact the Pengarah Tanah dan Galian Negeri Pulau Pinang, and available to be called as a witness; yet the defendant did not proffer any reasons for the non-calling of this material witness. The plaintiff submits that in this regard the court ought to draw adverse inference against the defendant under s 114(g) of the Evidence Act 1950. I would agree that this is an appropriate case for adverse inference to be drawn to the effect that if the witness had been called the evidence would have been adverse to the defendant.

[30] Further, the plaintiff's evidence had by and large remained unchallenged and the facts relied upon by the defendant in his defence were not put to the plaintiff's only witness, SP1, during cross-examination. Counsel for the plaintiff submits that in the circumstance the principles of law enunciated in *Browne v Dunn* (1893) 6 R 67 and accepted in the Malaysian courts through cases such as *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 and *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 would apply. Gopal Sri Ram JCA (later FCJ) had in *Aik Ming (M) Sdn Bhd v Chang Ching Chuen & Ors* expressed that principle in *Browne v Dunn* as follows:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with

equal force in the trial of civil causes as well. This rule as to cross-examination to which I have just adverted derives its name from the case in which it was expressed. It is the decision of the House of Lords in *Browne v Dunn* (1893) 6 R 67 where Lord Herschell LC stated the principle in this way (at p 70):

> Now, My Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact, by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making an explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

In the same case, Lord Halsbury had this to say (at p 76):

> My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

Having dealt with the evidence in that case, Lord Halsbury continued (at p 77):

> My Lords, it seems to me that it would be a perfect outrage and violation of the proper conduct of a case at nisi prius if, after the learned counsel had declined to cross-examine the witness upon that evidence, it is not to be taken as a fact that that witness did complain of the plaintiffs proceedings, that he did receive advice, that he went round to Mr Dunn as a solicitor, and that he did sign that retainer, the whole case on the other side being that the retainer was a mere counterfeit proceeding and not a genuine retainer at all.

The rule in *Browne v Dunn* has been applied by Indian courts in the context of the Indian Evidence Act 1872, on which is based our Evidence Act 1950. I need only refer to the decision in *Carapiet v Derderian* AIR 1961 Cal 359, where Mukharji J, at p 362 of the report, expressed the principle in the following words:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial

> and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiffs account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

[31] In the circumstance, I agree with the submissions for the plaintiff, that evidence of SP1 substantially remains unchallenged and uncontroverted. The question to ask then is this; has the evidence in its totality established the plaintiff's case.

[32] In *Hu Sepang v Keong On Eng & Ors* [1991] 1 MLJ 440 Lim Beng Choon J held that:

> … to establish civil liability for a breach of statutory duty the plaintiff must show that (a) the injury he has suffered is within the ambit of the statute, (b) the statutory duty imposes a liability to civil action, (c) the statutory duty was not fulfilled, and (d) the breach of duty has caused his injury.

Further, in *Asia Pacific Land Bhd & Ors v Datuk Bandar Kuala Lumpur* [2006] 2 MLJ 137, Abdul Malik bin Hj Ishak J (now JCA) in construing the essential elements necessary for a cause of action based on breach of statutory duty had held that 'the careless performance of a statutory duty does not in itself give rise to any cause of action in the absence of either a right of action for breach of statutory duty simpliciter or a common law duty of care in negligence'. Abdul Malik J then adopted into his judgment a passage from 'Clerk & Lindsell on Torts', (18th Ed), at p 599 on the essentials of an action for breach of statutory duty to the following effect:

> The claimant must show that the damage he suffered falls within the ambit of the statute, namely that it was of the type that the legislation was intended to prevent and that the claimant belonged to the category of persons that the statute was intended to protect. It is not sufficient simply that the loss would not have occurred if the defendant had complied with the terms of the statute. This rule performs a function similar to that of remoteness of damage.

[33] Applying the law to the facts of this case, I cannot but conclude that the plaintiff has successfully proved all the essentials of his claim. Mrs Boonsom

A was the proprietor of the said land. The defendant is appointed pursuant to s 12 of the NLC and the said section provides that the state director shall be responsible to the state authority for the due administration within the state of the provisions of this Act and shall exercise general control and supervision over the registrar and all other officers referred to therein. The defendant as state B director in the exercise of his statutory duties owes a duty of care to the plaintiff, a land owner.

[34] The facts of the case reveal that there have been breaches of that duty in C the issuance of the ACT; as well as the registration of transfer of the said land through the impugned MOT. The plaintiff has shown that Mrs Boonsom was not in Malaysia on the date on which the signature of the transferee was attested on the impugned MOT by Arifin bin Awang. The person who appeared before Arifin bin Awang was obviously not Mrs Boonsom. Who was D it then? We will probably never know the answer as the two police reports; the first made by Mrs Boonsom's solicitor on 12 July 1989 and second by the plaintiff on 22 July 2002 (pp 118–127 of CABD Vol II – bundle C) which in its ordinary course of events ought to have set the cog wheels of police investigations in motion do not seem to have served its purpose nor brought E about any definitive answers. In fact according to SP1, there has been complete silence on the part of the police and he does not know what the outcome of police investigations is. Further, Arifin bin Awang was not in court to explain away the matters complained by the plaintiff and to clear his role in this sorry affair.

F

[35] Clearly the defendant had been negligent. The fraud could have been prevented had the defendant followed the mandatory statutory procedure provided in the NLC for the issuance of title in continuation. Had the defendant sent the requisite statutory notices as required under s 433 of the G NLC to Mrs Boonsom's address as in the defendant's own quit rent register; or posted the notices at prominent public places as provided; or published an advertisement in a newspaper circulating in Penang, it may just as well have exposed the fraud of the forger and prevent the fraudulent transfer of the said land. It is precisely for these reasons that such statutory provisions are enacted; H so that it may afford protection and safeguard to land owners who may otherwise be defrauded by unscrupulous fraudsters.

[36] The defendant and his officers, without doubt owe a duty of care to land owners to act in commensurate with the standard of care that is required of I them in ensuring that mandatory statutory procedures are followed. The fact that Mrs Boonsom came to know of the fraudulent transfer following the notice appearing in the *Thairat Newspaper* in Bangkok on 11 June 1989 ('exh P13'), albeit post facto, only fortifies the need for proper and timely statutory notices to be sent out by the defendant as required in s 168 and s 433 of the

NLC. The failure of the defendant to issue the statutory notices is a clear breach of statutory duty as well as breach of common law duty of care giving rise to negligence.

[37] The plaintiff has also shown that the damages suffered by Mrs Boonsom, and her estate subsequently, had flowed from the defendant's said breaches. The fraud could have also been prevented had the said Arifin bin Awang been more vigilant in the attestation of the forger's signature as that of Mrs Boonsom on the impugned MOT. The conduct of the officers in the land office concerned in this transaction in 1989 and the subsequent non-calling of a material witness to testify in this case leaves much to be desired about the workings of the defendant's department. Further, when answers are not forthcoming to explain the defendant's conduct in this regard, it mere compounds matters and exposes the lack of bona fide on the part of the defendant.

[38] Having said that, I shall now focus on the defence of limitation as pleaded by the defendant. The defendant relies on s 2(a) of the Public Authorities Protection Act 1948 ('PAPA') which states:

> Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six month next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

[39] Further, the defendant alludes to the statutory defence of good faith as available to the defendant pursuant to s 22 of the NLC which provides that:

> No officer appointed under this part shall be liable to sued in any civil court for any act or matter done or omitted to be done, by him in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under this Act.

However, I must say that the defendant has not shown any good faith in the exercise of his duties; and in this regard I would reiterate my earlier observation that from the totality of the defendant's and his officers' conduct from 1989 till the date of this trial, good faith on the part of the defendant is conspicuously absent.

[40] The defendant further relies on the Federal Court decision in *Selvaraju*

a/l Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor [2007] 7 MLJ 1 where Nik Hashim FCJ in delivering the judgment of the court on the issue of limitation of action pursuant to s 2(a) of the PAPA held as follows:

> In our judgment, s 2(a) of the Act is mandatory in its terms. The word 'shall' is used twice in that section indicating that the 36 months period in respect of time is a mandatory requirement and it cannot be abridged.

[41] The defendant contends that the transfer of the said land to Adorna via the impugned MOT was registered on 24 May 1989. Mrs Boonsom became aware of the fraudulent transfer of the said land sometime before the first of the two police reports were made on 12 July 1989. Therefore, according to the counsel for the defendant computation of time for the purpose of limitation of action starts to run, at the very latest, from 12 July 1989 and the period of 36 months pursuant to s 2(a) of the PAPA would expire on 12 July 1992. The defendant, therefore, argues that this action which was filed on 15 March 2005 is clearly out of time.

[42] The plaintiff counters that by arguing that a cause of action for negligence arises not from the date when the act complained of took place but arises from the date when damage occurs. According to the plaintiff damage is suffered when it is ascertainable and quantifiable in financial terms. In support of that proposition, counsel for the plaintiff has referred to several case authorities. The first is *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 at p 1630 where Lord Nichols of Birkenhead in his speech in the House of Lords stated as follows:

> As every law student knows, causes of action for breach of contract and in tort arise at different times. In cases of breach of contract the cause of action arises at the date of the breach of contract. *In cases in tort the cause of action arises, not when the culpable conduct occurs, but when the plaintiff first sustains damage*. Thus, the question which has to be addressed is what is meant by 'damage' in the context of claims for loss which is purely financial (or economic as it is sometimes described). (Emphasis added.)

[43] The same principle of law was laid down in *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784 by the Court of Appeal in the judgment of Abdul Malik Ishak JCA as follows:

> It is trite law that a cause of action founded in tort accrues when the appellant suffers damage (*Goh Kiang Heng v Hj Mohd Ali bin Hj Abd Majid*). According to the case of *Forster v Outred & Co* [1982] 1 WLR 86 (CA), it was necessary to prove actual damage in order *to constitute a cause of action in negligence and that on the pleaded facts the plaintiff had suffered actual damage through the defendant's negligence by executing a mortgage deed whereby her property was encumbered with a legal charge and she was subjected to a liability which might mature into a financial loss; and that, therefore, her*

cause of action accrued in February 1973 notwithstanding that she did not actually become liable for the repayment of the loan until the demand was made and, accordingly, the second writ was issued outside the six years' limitation period and the action begun by the first writ was rightly dismissed. (Emphasis added.)

Nourse J, in *Melton v Walker and Stanger* (1981) 125 Sol Jo 861 applied the case of *Forster v Outred & Co* and came to the same conclusion to the effect that *a cause of action founded in tort accrued when the plaintiff suffered damage* and that the cause of action was completed on 7 April 1967. Templeman LJ, writing for the Court of Appeal in *Baker v Ollard & Bentley (a firm) & Anor* (1982) 162 Sol Jo 593, aptly said that:

> The period of limitation under the Limitation Act 1939 begins to run when the cause of action accrues. *In negligence actions damage is an essential part of the cause of action and thus the relevant period of limitation, in this case six years, runs from the date of the damage and not from the date of the act which causes the damage.* (Emphasis added.)

[44] Further, the House of Lords in *Cartledge & Ors v E Jopling & Sons Ltd* [1963] 1 All ER 341 held that the cause of action for breach of statutory duty arose when material damage has been suffered by the plaintiffs, even if that damage is latent. Though, this decision which had followed the law then was considered harsh and had to be remedied by legislative intervention.

[45] I agree with the submission by the plaintiff's counsel that a cause of action in tort arises when the claimant first suffers damages. However, I cannot agree with the contention that time runs from the date when damages is ascertainable and becomes quantifiable in monetary or financial terms. The plaintiff's stand is that the damages suffered by Mrs Boonsom and subsequently her estate became ascertainable only when the plaintiff had exhausted all legal remedies available for the recovery of the said land. Therefore, the plaintiff argues that time should run from the date when it became patently clear to the plaintiff that there were no prospect of recovery of the said land; which according to the plaintiff became apparent only after the last of the two review applications to the Federal Court was dismissed on 27 August 2004.

[46] I find it difficult to accept that argument. I am of the view that the date on which the plaintiff first suffers damages would be the date on which time starts to run for computing limitation. Damages in this context are not merely confined to financial or economic loss. The moment Mrs Boonsom lost her legal title to the said land following the fraudulent transfer to Adorna, damages in various forms would have set in; and the moment Mrs Boonsom knew of the transfer of the said land to Adorna material damage would have been suffered by the plaintiff. The damage to the plaintiff at that point in time would include the loss of her legal title to the said land, the right to possession of the said land,

A the right to use the said land and the right to deal with the said land. The fact that Mrs Boonsom had suffered such damages very much earlier is evident in Mrs Boonsom's prayer for relief claimed in the Adorna suit in the High Court filed in 1989 where in the words of Vincent Ng Kim Khoay J (later JCA), Mrs Boonsom had as part of the relief sought, claimed for 'Damages — as the B plaintiff was by reason of the fraud and/or forgery prevented from disposing of the same' (please see *Boonsom Boonyanit @ Sun Yok Eng v Adorna Properties Sdn Bhd* at p 48). This is clear admission by the plaintiff in his own earlier pleadings that damages had been suffered way back in 1989; though not quantified at that time. Therefore, the contention by the plaintiff that damages had been C suffered only after the second of the two review applications had been dismissed by the Federal Court is wholly untenable in law or in fact.

[47] Even, if I were to accept the plaintiff's argument that in the circumstance of the facts of this case damages were suffered only when there D was finality in the Adorna suit, then that finality would have come about when the Federal Court allowed Adorna's appeal on 22 December 2000 and limitation would have set in 36 months later, that is on 22 December 2003. This would mean that the filing of the present action on 15 March 2005 would be out of time as well. If I were to accept the plaintiff's argument that limitation E set in after the second of the two reviews was dismissed by the Federal Court, then endless applications for review by litigants would keep limitation going without end. There would be no finality. This would go against the very rationale and purpose of limitation which was so eloquently expressed by Hashim Yeop Sani CJM in *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] F 1 MLJ 409 at p 413 in the following words:

> The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accordance with the maxim interest *reipublicae ut si finis litium* G that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

[48] This is further fortified by the decision of Mohd Ghazali FCJ in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158 at p 179 where H His Lordship held that:

> Rule 137 of the Rules of the Federal Court 1995 allows the Federal Court to exercise its inherent powers to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. The rule has I been invoked by the Federal Court in a number of cases like *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1 and *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun* [2002] 2 MLJ 673. However, it must be observed that its application was only in limited circumstances. If there were to be a liberal application of r 137 then there would be chaos to our system of judicial hierarchy. Hence, we would think that it is on a case by case basis. Certainly it cannot be the intention of the Legislature

when promulgating r 137 that every decision of this court is subject to review. To do so would be against the fundamental principle that the outcome of litigation should be final.

[49] Similar sentiments were expressed by Abdul Hamid Mohamad CJ in *Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 2 MLJ 137; [2008] 6 CLJ 1 — where in relation to the stand taken by the Federal Court in regard to invocation of r 137 of the Rules of the Federal Court 1995, the learned chief justice held as follows:

> In an application for a review by this court of its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstance in which a review may be made. Only if it does, that the court reviews its own earlier judgment. Under no circumstances should the court position itself as if it were hearing an appeal and decide the case as such. In other words, it is not for the court to consider whether this court had or had not made a correct decision on the facts. That is a matter of opinion. Even on the issue of law, it is not for this court to determine whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion. An occasion that I can think of where this court may review its own judgment in the same case on question of law is where the court had applied a statutory provision that has been repealed. I do not think that review power should be exercised even where the earlier panel had followed certain judgments and not the others or had overlooked the others. Not even where the earlier panel had disagreed with the court's earlier judgments. If a party is dissatisfied with a judgment of this court that does not follow the court's own earlier judgments, the matter may be taken up in another appeal in a similar case. That is what is usually called 'revisiting'. Certainly, it should not be taken up in the same case by way of review. *That had been the practice of this court all these years and it should remain so. Otherwise, there will be no end to litigation. A review may lead to another review a further review.* (Emphasis added.)

[50] Again the same line of thought can be seen in the joint judgment of three judges of the Federal Court delivered by Zaki Tun Azmi CJ in *Badan Peguam Negara v Kerajaan Malaysia* [2009] 2 MLJ 161 at p 193 to the following effect:

> Some may see the view we take of the law on the subject under discussion as purchasing finality at the expense of justice. To them we can do no better than commend the words of Lord Simon of Glaisdale in *Committee for Privileges the Amphill Peerage* [1977] AC 547 at p 576:
>
> > …the fundamental principle that it is in society's interest that there should be some end to litigation is seen most characteristically in the recognition by our law — by every system of law — of the finality of a judgment. If the judgment has been obtained by fraud or collusion it is considered a nullity and the law provides machinery whereby its nullity can be so established. If the judgment has been obtained in consequence of some procedural irregularity, it may sometimes be set aside. But such exceptional cases apart, the judgment must be allowed to

conclude the matter. That, indeed, is one of society's purposes in substituting the lawsuit for the vendetta. Sometimes it is the parties to the litigation and those who claim through them who are bound by the judgment; but sometimes it is the whole world which must accept the decision.

[51] The defendant has a right in law to raise the statutory defence of limitation and has done so here. I will have to give due consideration to that defence and have done so accordingly. I can understand that the plaintiff feels aggrieved by the decision of the Federal Court in the Adorna appeal. The plaintiff says that he has lost the said land because the Federal Court was blatantly wrong in its decision and that the subsequent judgment of the Federal Court in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1 which overturned its earlier Adorna decision lends credence to the legal view held by the plaintiff and his legal advisors that Mrs Boonsom's suit against Adorna should have succeeded, and the said lands recovered. The plaintiff further states that Mrs Boonsom and subsequently her estate had never slept on their rights but to the contrary they have prosecuted with unrelenting vigour to this date at great expense of time and funds and that the plaintiff ought not to be penalised with limitation to bar this action against the defendant.

[52] Be that as it may, after the first round of written submissions were made I asked counsel for the plaintiff why the plaintiff did not name the defendant a party to the original suit against Adorna in 1989. Had the defendant been named a party therein, this suit would not be necessary. In answer to this query, the plaintiff's counsel submitted that when the action for recovery of the said land was filed against Adorna, there were no damages in terms of financial amounts sustained by the plaintiff as a result of any negligence by the defendant. The plaintiff's counsel adds that if the action against Adorna had succeeded, as it ought to have; or if any of the Federal Court reviews had been successful, the plaintiff would have recovered the said lands and there would not be any necessity to bring an action against the defendant. The plaintiff's counsel added that they were so sure of the law on defeasibility of title to the extent that they were fully confident that the plaintiff would recover the said land. I find this explanation hard to accept. The plaintiff's complaint from 1989 had been that the fraudulent transfer of the said land was occasioned by the negligence and breaches of statutory duty by the defendant. Adorna may have been an innocent purchaser for valuable consideration. In fact that was the finding by the High Court then and affirmed by the Federal Court. Had the plaintiff named the defendant herein as co-defendant in the Adorna suit, in the face of overwhelming evidence adduced herein, the courts would have in all probabilities found negligence and breach of statutory duty against the defendant. Therefore, in my view the plaintiff ought to have named the defendant as a party to the Adorna suit.

[53] In the beginning I alluded to the fact that this is the sequel to a sad saga; which is now part of the annals of the nation's legal history. The helplessness of the plaintiff in the face of the fraud perpetrated leading to the loss of the said land is very evident. The apparent negligence and breach of statutory duty by the defendant and the complete inaction of the police in bringing the forger and fraudster to book is very disturbing indeed. After all the fraudster was represented by a firm of solicitors in Penang in the transfer of the said land to Adorna and there would have been sufficient leads for investigations.

[54] I symphatise with the plight and predicament of the plaintiff. No matter what my sympathies are, I am constrained to apply the law as it exists. The law of limitation of action as it stands is very strict and rigid. There is no room for the exercise of judicial discretion to extent time. The intent of Parliament is very clear from the unambiguous words in s 2(a) of the PAPA. The Federal Court has also made the law in this regard abundantly clear in *Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor* at pp 11–12 as follows:

> In *Datuk Bandar Kuala Lumpur v Kuala Lumpur Golf and Country Club Bhd* [2007] 3 MLJ 293; [2005] 3 CLJ 901, Abdul Hamid Mohamad FCJ (later PCA) delivering the judgment of the Federal Court, referred to the case of *Majlis Peguam & Anor v Tan Sri Dato Mohamed Yusoff* [1997] 2 MLJ 271 where it held that the specific law (referring to the requirement of notices to be posted for three months under s 15(5) of the Legal Profession Act 1976) overrides the general law under para 8 of the Schedule to the Courts of Judicature Act 1964 ('the CJA'), which provides for enlargement or abridgment of time for doing any act, when limitation is explicitly provided for. Likewise, s 2(a) of the Act overrides para 8 of the Schedule to the CJA for s 2(a) of the Act is a specific provision with no power to enlarge or abridge time. And to hold otherwise would be in direct conflict with s 25(2) of the CJA and therefore not in accordance with written law. *It is worthy of note that the purpose of s 2(a) of the Act is to give time period for any action brought against any person acting in execution of statutory or other public duty within 36 months after the act complained of. The 36 months period is incorporated into s 2(a) as a reasonable period of time for such action and it is not for the court to query legislation but merely to give effect to the will of Parliament as expressed in the law.* It is in that spirit we say that the refusal of the Court of Appeal in *Md Aris* to follow the decision of the Federal Court in *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower* [1983] 2 MLJ 54 is unjustified and in breach of the doctrine of stare decisis for not following loyally the decision of the higher court on the same matter. As *Mersing Omnibus* was the judgment of the Federal Court, the Court of Appeal was bound to follow it whether the Court of Appeal agreed with it or not (see *Metramac Corp Sdn Bhd v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113; *The Co-operative Central Bank Ltd v Feyen Development Sdn Bhd* [1997] 2 MLJ 829; *Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy & Ors* [2005] 6 MLJ 120 per Ahmad Fairuz JCA (later Chief Justice)). Indeed it is not for the Court of Appeal to question whether the procedure to require an applicant for certiorari to move the court for leave within six

A weeks from the date of the decision is fair or not. It is a matter for the Rules Committee acting under s 16 of the CJA to decide. (Emphasis added.)

[55] It is patently clear that I do not have the power to enlarge or abridge time. If I had the power to extend time, I may on the peculiar circumstance and facts of this case have done so in the interest of justice. But alas, I can do no such thing. I am constrained by the doctrine of stare decisis to loyally follow legal precedent. That is the corner stone of the common law system on which the Malaysian legal system is based.

[56] Having said that, I must add that, this may be an opportune time for the Rules Committee or the Commissioner for Law Reform to look into this area of the law and review the law on limitation just as it was done in England not too long ago; for such a review is long overdue. I would not be the first to make such a call, for similar calls for review have been made by jurists and academics in the past. Prof Choong Yeow Choy, Dean of the University of Malaya, Law Faculty, in his book 'Law of Limitation' (Butterworths 1995 Ed) at pp 50–51 makes the following observation:

> In Malaysia, unfortunately, the law very much remains archaic as no significant amendments have been made since the coming into force of the Limitation Act 1953 on 9 February 1953. The Limitation Act 1953 was revised in 1982 but the amendments made were merely cursory in nature and had very little effect on the original framework and contents of the Act. Hence if a case such as Cartledge or Pirelli General Cable Works were to arise, our courts would be faced with the same dilemma as the House of Lords first did some 30 years ago. The only solution is through legislative intervention.

[57] Until there is such legislative intervention, I would have to apply the law as it stands and unfortunately for the plaintiff it does stands not in his favour. I find that the plaintiff's claim is time barred by s 2(a) of the PAPA. I therefore, dismiss the plaintiff's claim with cost and order that cost be fixed at RM10,000.

Claim dismissed with costs.

Reported by Kohila Nesan